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Supreme Court of the United States

October Term, 1968

No. 465

IN THE MATTER OF:
LIGHTING CENTER, INC., BANKRUPT

IN RE:
A. M. FAUCETTE, JR., TRUSTEE IN BANKRUPTCY,
PETITIONER,

versus

MRS. RUTH K. VAN DOLSON, RESPONDENT

REPLY OF RESPONDENT TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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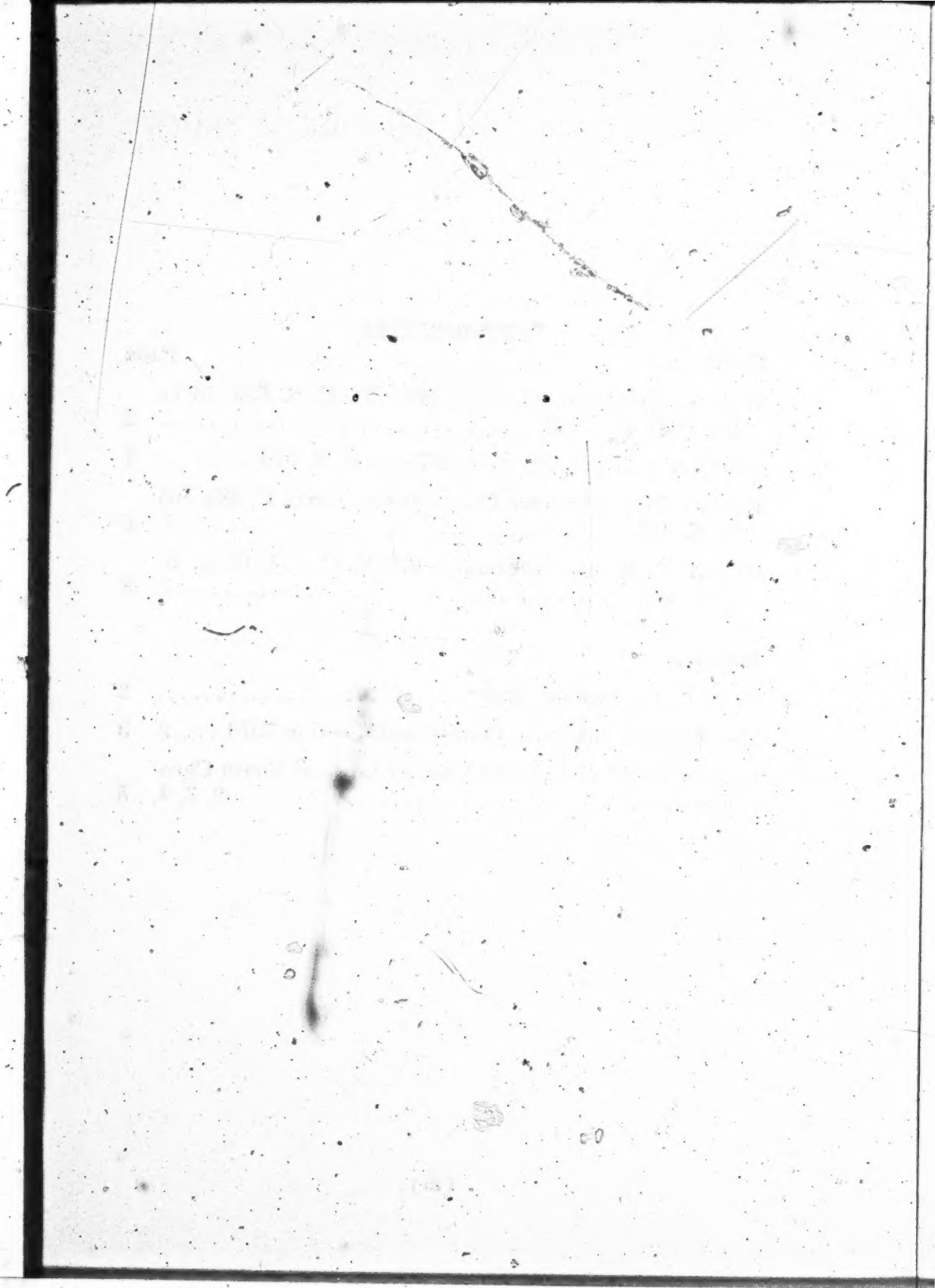

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The Respondent hereby petitions this Honorable Court to deny a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit entered June 6, 1968.

JURISDICTION

Appellee respectfully contends that the position of Appellant as to the jurisdiction of this Court in the instant matter is without merit.

Appellant asserts that a conflict of decision exists between the Second and fourth Circuit Courts of Appeal in the construction of allegedly similar State Statutes, Section 45-155 of the 1952 Code of Laws of South Carolina and 1949 Rev. S. Conn. 7279.

The most cursory reading of these two statutes shows that they are, in fact, entirely dissimilar and that, therefore, no conflict can exist in their construction.

It is further respectfully contended that in the absence of a conflict in Circuit Court opinions, Rule 19 of the Rules of the Supreme Court of the United States and Title 28, Section 1254 U.S. Code Annoted, as construed by the case of *Wolf v. Weinstein*, 83 S. Ct. 969, 372 U. S. 633, 10 L. Ed. (2d) 33 (1963) do not provide for the consideration of the instant matter by this Court but that the answer to the jurisdictional question involved was stated by this court at page 636:

> "... the controversy ... primarily implicates questions of Pennsylvania Law and presents no Federal question of substance. In the circumstances, the writ of certiorari ... is dismissed as improvidently granted."

QUESTIONS PRESENTED

Respondent adopts petitioner's questions as printed.

APPELLEE'S ADDITIONAL STATEMENT OF THE CASE

Appellee contends that Appellant's statement of fact contains the following inaccuracies, to wit:

1. As to the statement of the insolvency of the corporation at the time of the purchase of the stock, Appellant submits that there is no testimony in the record showing the Van Dolson's knowledge of the pending insolvency of the corporation.

2. That contrary to Appellant's statement, Mrs. Van Dolson, the Appellee, was not present at the corporate meeting as alleged therein. Appellant's brief before the Circuit Court of Appeals has set this out at Tr. 28-33, affirmatively showing that Mrs. Van Dolson was in fact not present.

3. As to Appellant's contention that Mr. Van Dolson was acting for the corporation in addition to representing his wife's interest, there is no testimony to affirmatively substantiate this fact and, in reality, the testimony affirmatively shows the contrary to be the case.

4. Appellant sets out various appraisal prices. However, the stipulated facts below conclusively show that these assets were purchased for $8,000.00 which was the highest obtainable bid regardless of the appraised prices.

ARGUMENT

Question I

Appellant seeks construction of Section 45-155 of the 1952 Code of Laws of South Carolina by this Court. In aid of his contention he quotes 1949 Rev. S. Conn. 7279, a Conn. Statute which has been heretofore construed in a Circuit Court of Appeals:

> "Any person who shall loan money upon a note secured by a mortgage upon personal property, in which the sum of money loaned is stated to be greater than the amount actually loaned, or in which the rate of interest to be charged is greater than the rate allowed by law to be charged by pawnbrokers, shall be fined not more than fifty dollars or imprisoned not more than three months or both; and the mortgage and note secured thereby shall be void." (emphasis added)

On the other hand, Sec. 45-155, **Code of Laws of South Carolina** (1952) "Unlawful to take mortgage for greater amount than actually lent."

> **"It shall be unlawful for any such lender of money, his agents, employees, or any person in his behalf, to have inserted in his mortgage,** or bill of sale, as representing the indebtedness of the mortgagor or vendor, an amount in excess of the actual amount of money received by the borrower, except as provided for in Sec. 45-153 and Sec. 45-154 and recording fees." (emphasis added)

Without question these statutes vary. The Connecticut Statute is self operative by its very language, as are most criminal statutes.

The South Carolina Statute, however, is entirely different. It is a civil statute invoking, when all conditions therein are met, a forfeiture.

Before the Statute becomes operative, he who seeks to invoke it necessarily must affirmatively prove:

(1) That the mortgage was prepared by the lender or its agents;
(2) That the overstatement in this mortgage was made by lender or its agents;
(3) That said overstatement was purposely inserted by lender.

The record is completely void of any proof or even an attempt to prove that the lender caused the overstatement to be inserted in the mortgage now before this Court.

The evidence conclusively shows the contrary.

The scrivener of the instrument in question was the attorney for the corporation, the borrower, and for the individual corporate stockholders.

The existence of the overstatement is not alleged to have been either known to the lender or caused by her.

Robert Van Dolson testified that he had no knowledge that the mortgage was an amount greater than $10,000.00. He even testified further that he had considered the $676.40 in question to have been a separate loan made by him entirely outside of the mortgage in question and from his funds.

Reference is made to the Order of Referee dated June 21, 1962. There, the last paragraph orders Mr. Van Dolson to restore this amount to the trustee as an unlawful preference. This portion of the order has not been appealed.

It would therefore seem that the fact of the intentions of all concerned are well corroborated.

It is obvious that the affirmative proof required to invoke the desired forfeiture is fatally deficient.

While Appellant contends that construction of related statutes are persuasive toward his view, it should be noted that no statute relied upon by the appellant requires an affirmative act on the part of the lender as does Sec. 45-155 of the 1952 Code of Laws of the State of South Carolina.

Appellant relies upon a lack of judicial decisions requiring *mens rea* on the lender's part. Unfortunately, no precedent has been advanced construing a statute which, by its very language, requires an affirmative act on the part of the lender as does the statute upon which the appellant now relies.

The bulk of appellant's argument concerns itself with an affirmative stand that there was no testimony that the overstatement was the scrivener's error of the corporation's attorney. A most casual review of the testimony shows ample basis for this finding of fact by the Referee. It must appear that a contrary finding is impossible.

Appellant further contends that the terms of the mortgage are always construed strictly against the mortgagee. This is obviously incorrect as it is a fundamental rule of construction that the terms of an ambiguous instru-

ment, everything else being equal, will be construed against the party who prepared the instrument.

The evidence is overwhelming that this instrument was prepared by Mr. Clifton, the attorney for the corporation, the borrower, and for each of the individual stockholders.

The balance of appellant's argument confines itself to matters in which there is a conflict of testimony.

The conflicts have been resolved in favor of the defendant in this matter by the Hearing Officer who alone has had the opportunity to observe the demeanor and conduct of the witnesses and assess the probative value of their testimony. No sound reason has been advanced to reverse the Referee on his finding of fact. Nor has valid legal precedent to make the desired forfeiture been shown.

It is therefore submitted that the order appealed from is correct and should be affirmed by this Court.

Question II

Here the appellant apparently seeks a reversal of the Referee's finding of fact in spite of said finding having been many times affirmed.

The sole dispute raised here is factual in nature. Was Van Dolson an "interested director"?

In order to properly resolve this question, it must be kept in mind that any interest alleged by the appellant must be affirmatively proven by this appellant to be an interest adverse to the best interests of the corporation and an interest which works to the detriment of said corporation.

Appellant's claims of interest are founded solely upon his cross examination of Mr. Van Dolson wherein he asked him if he was interested in securing money loaned by his wife. Under the cases cited, this would hardly amount to an adverse interest sufficient to set aside security for money actually advanced and paid out to the corporate creditors.

It would be more aptly characterized as a clever play on words by a learned cross examiner in an attack upon an honest but uninformed layman.

The South Carolina cases cited by appellant in support of this contention are factually extremely dissimilar to the instant case.

In each of them the director in question was himself the interested party; his interest was never imputed to another.

Each case depends upon the factual finding that the director was proven to have a personal, active, and adverse interest of his own.

In summary, the interest of the corporation, which received $10,000.00, was much better protected than the interest of the lender who only recovered $8,000.00. Apparently, the Appellant contends that the corporation was in some manner prejudiced, but has shown no detriment to the corporate interests. To the contrary, the creditors of the corporation have profited by the transaction at the lender's expense in the amount of $2,000.00.

It is therefore easily seen that Mr. Van Dolson's interest was not the interest required to bring this case within the authorities cited.

Peurifoy v. Loyal, 134 S. C. 267, 151 S. E. 579;
Fidelity Fire Insurance Co. v. Harby, 156 S. C. 238, 153 S. E. 141;
Gilbert v. McLeod Infirmary, 219 S. C. 174, 64 S. E. (2d) 524.

In each of these cases the necessary adverse interest was found as a fact based upon the following circumstances: In the *Peurifoy* case the interested director in question had actually stolen certain bonds of the bank of which he was president and pledged them elsewhere as collateral on his own account. Subsequently, he, together

with an accomplice, voted at a board of directors meeting to approve this act, attempting to ratify an obviously illegal act, the taking of the property of the corporation and converting it to his own use without consideration.

In the *Fidelity Fire Insurance Co. v. Harby* case the interested director who was necessary to make a quorum for a vote on corporate purchase of land was in fact the real estate broker who claimed a commission from the party who sold the land to the corporation as well as from the corporation for "services rendered."

In the *Gilbert v. McLeod Infirmary* case the facts show, and the court so held, that the interested directors were the purchasers of land owned by the corporation; that the consideration for the purchase was inadequate and that the purchase was attempted to be effected in unseemly haste and with the exercise of undue influence by the director.

In the case before this court, the transcript yields the following facts:

(1) Mrs. Van Dolson, the lender, was not present at the meeting in question.

(2) The ten thousand ($10,000.00) dollars was paid to the corporation and immediately disbursed to *bona fide* creditors.

(3) The security given to the lender by the corporation was inadequate, ultimately bringing at sale to the highest bidder 20% less than the amount of money loaned. (Stipulated facts.)

It is quite obvious that no parallel can be drawn between the facts of the instant case and the above cited cases. In each of the cited cases the director was either attempting to, or did, convert the funds or property of the corporation to his own use, either illegally or immorally, while in the instant case the director in question obviously protected the interests of the corporation far better than he did the interests of the lender. It is therefore easily

seen that the alleged interest on the part of Mr. Van Dolson was not the requisite adverse interest necessary to negate the security for which good and valid consideration was paid. Further, to impute such an interest to Mr. Van Dolson would necessarily require the negation of the long standing doctrine of *Femme Sole* and impute the acts of the husband to the wife.

It is therefore respectfully submitted that the correct decision was initially reached by the Referee who alone has had the opportunity to weigh the credibility of the witnesses and to determine the real truth in this matter, and was correctly affirmed by the District Judge.

Once the lack of the necessary adverse interest is determined, no further inquiry is necessary at this point nor is any further inquiry pertinent to the issue.

However, it is well to note that the correct statement of law has been aptly quoted in the order of the Honorable Judge Hemphill, dated December 18, 1967.

This law applied to the facts as adduced from the testimony is such that the appellant's contention is without merit. The burden of proving that the actions of Mr. Van Dolson, even if found to be an interested director, were fair and in good faith and consistent with the best interests of the corporation, has been amply met as required by law, and it is earnestly submitted that the mortgage in question is valid and must stand.

CONCLUSION

It is respectfully submitted that the application for certiorari herein is based entirely on questions of South Carolina Law and presents no Federal Question of Substance. In these circumstances it would appear that the petition for the Writ of Certiorari must be dismissed.

It is further respectfully submitted that there is nothing in the record to justify a reversal. The transcript, if thoroughly studied, can and does produce only one reasonable inference and that is that the only true and equitable result possible has been reached and has been affirmed. That the Order of Judge Hemphill, dated December 18, 1967, is properly based upon the applicable law and the found facts, that it is correct and should be affirmed by this Court.

Respectfully submitted,

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